

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY LAMB,

Defendant and Appellant.

C046556

(Super. Ct. No.
02CR2234)

APPEAL from a judgment of the Superior Court of Amador County, Don F. Howard, Judge. Affirmed.

Marcia C. Levine, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, Ward A. Campbell, Supervising Deputy Attorney General, and Patrick J. Whalen, Deputy Attorney General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts IB and C, II, III, and IV of the Discussion.

After taking pain medication and drinking enough beer and tequila to register a 0.22 percent blood alcohol content, defendant Timothy Lamb drove his truck down a two-lane road at speeds nearly twice the posted speed limit. He lost control of his vehicle, crossed the center line, hit one car and injured its driver, then hit a second car and killed its driver.

A jury acquitted defendant of murder (Pen. Code, § 187, subd. (a))--count 1; unspecified statutory references that follow are to the Penal Code) and found untrue allegations that the driver of the first car suffered great bodily injury (§ 12022.7, subd. (a)). However, the jury convicted defendant of gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a))--count 2), driving under the influence (DUI) causing injury (Veh. Code, § 23153, subd. (a))--count 3), and causing injury by driving with a blood alcohol level of more than 0.08 percent (§ 23153, subd. (b))--count 4). The jury also found true various charged enhancements, including that defendant personally inflicted death on one person (§ 12022.7, subd. (a)), injured more than one victim (Veh. Code, § 23558), and had a blood alcohol level of at least 0.20 percent (Veh. Code, § 23578). The trial court found true defendant's two prior DUI convictions.

Sentenced to an aggregate prison term of 17 years to life, defendant appeals, asserting that (1) the court erroneously concluded that defense counsel failed to disclose evidence as required under the discovery statutes and then abused its

discretion in imposing sanctions for that violation, (2) the court was biased against him, (3) cumulative error compels reversal, and (4) his convictions on counts 3 and 4 must be reversed because they are necessarily included offenses of count 2. We affirm the judgment.

FACTS AND PROCEEDINGS

At approximately 10:30 p.m., Amador County Sheriff's Officer Jeff Milbourne was driving southbound on New York Ranch Road at less than the posted 35 miles per hour speed limit. As he approached a bend in the road, he noticed a truck speeding in the opposite direction; Milbourne estimated the truck was traveling at 65-70 miles per hour. The truck crossed the center line and Milbourne jerked his car to the right to avoid a collision. As he looked in his rear view mirror, he saw that the truck had collided with the car that had been behind him. The truck went on to hit a second car, killing its driver.

The driver of the first car, Mary Abello, described driving behind the sheriff's car and seeing the oncoming truck, which was "zigzagging" back and forth over the center line at a speed she estimated at 50-60 miles per hour. She tried to avoid the truck by pulling over to the right side of her lane, but the truck hit her, spinning her car across the roadway.

Officers investigating the accident found defendant sitting at the wheel of the truck. He told one officer that a car had come into his lane. In response to questioning, he told the officer that he had not had anything to drink that night.

Another officer talked to defendant at the hospital. Defendant said that he had been driving at 35-40 miles per hour and that another car had "interfered with him." Defendant's breath smelled of alcohol, his speech was slightly slurred, and his eyes were watery and bloodshot. Defendant again denied having had anything to drink, but upon further questioning, said he had had "just a little." The officer tried to administer a preliminary alcohol screening test, but defendant repeatedly blocked the air tube with his tongue to prevent his breath from entering the device.

Defendant's blood was drawn at approximately 11:50 p.m., nearly 90 minutes after the accident. Defendant had a blood alcohol content of 0.22 percent. Defendant had admitted taking Vicodin that day to relieve pain from a knee injury, and blood tests confirmed the presence of that painkiller.

Defendant was charged with murder (count 1), gross vehicular manslaughter while intoxicated (count 2), DUI causing injury to Frank Johnson and Abello (count 3), and causing injury to Johnson and Abello while driving with a blood alcohol level of at least 0.08 percent (count 4). Count 2 included an allegation that defendant had two prior DUI convictions. The information also charged numerous enhancements, including that defendant caused death to Johnson and great bodily injury to Abello and that defendant caused injury to more than one victim.

At trial, Officer Milbourne and Abello described the accident and their observations of defendant's driving. Milbourne testified that he was absolutely certain that he saw

defendant cross the center line and enter the opposing lane. He was also certain that defendant was speeding at approximately 65-70 miles per hour. Abello was equally sure that defendant was speeding and lost control of his truck.

The prosecution introduced a surveillance videotape that, according to expert witnesses, showed defendant driving at 72 miles per hour at a spot less than a mile before the accident site.

A criminalist opined that a person with a 0.22 percent blood alcohol level would be unable to drive safely. A toxicologist testified that the use of a painkiller would make this impairment worse, and that the combination would make an individual an unsafe driver.

Expert witnesses for the prosecution and defense testified at great length, giving competing explanations of evidence found at the scene and the cause of the accident. The prosecution contended that defendant drove over the center line and into the two vehicles. Defendant argued that Abello caused the accident when she crossed into the lane of opposing traffic while passing Johnson's car.

DISCUSSION

I

Violation of Discovery Rules and Resulting Sanctions

Defendant challenges the court's determination that defense counsel violated discovery rules by failing to disclose information from his accident reconstruction expert. He also

challenges the propriety of the sanctions imposed by the court for this violation. We discuss each claim in turn.

A. Discovery Violation

Section 1054.3 provides in relevant part that "[t]he defendant and his . . . attorney shall disclose to the prosecuting attorney: [¶] (a) The names and address of persons . . . he . . . intends to call as witnesses at trial, *together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case,* and including the results of physical . . . examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial. . . ." (Italics added.)

At trial, the prosecutor complained that he had received no discovery from Ralph Todd, defendant's accident reconstruction expert. Defense counsel responded that no disclosure was required because Todd had not prepared any written reports. Any notes Todd had, counsel argued, were preliminary in nature and not discoverable. Counsel asserted that no report was prepared because defendant could not afford to have one written.

In a discussion with the trial court, Todd mentioned that written reports are sometimes not prepared in order to avoid discovery. Todd and counsel both acknowledged that they had had numerous conversations and meetings about the accident to discuss Todd's theory as to the accident's cause. Todd's notes

involved witness interviews, calculations, and his inspection of the cars involved in the accident. Todd said he conveyed the information contained in these notes in general terms to defense counsel.

The trial court concluded that defense counsel had deliberately withheld information from the prosecutor in violation of discovery rules. The court permitted Todd to testify but imposed other sanctions, as discussed later.

Defendant contends the court erred concluding a discovery violation had occurred. We do not agree.

Defendant's argument is predicated in large part on his belief that it is only written reports of an expert that must be disclosed to the prosecution. He asserts that because no such report was prepared, and because there is no requirement that counsel obtain a written statement from a witness (see *In re Littlefield* (1993) 5 Cal.4th 122, 136), there was no discovery violation. He also asserts that Todd's notes reflected only interim conclusions, not final opinions, and therefore were not discoverable. (See *Hines v. Superior Court* (1993) 20 Cal.App.4th 1818, 1823.) Defendant reads the requirements of section 1054.3 far too narrowly.

As previously noted, section 1054.3 requires a defendant to disclose not only written reports, but also "any reports or statements of experts made in connection with the case." Todd stated that while he had not prepared any reports, he had made notes about the interviews with witnesses, had made calculations to determine the cause of the accident, made notes about his

inspections of the vehicles, and had conveyed this information to defense counsel. Over the course of several meetings, Todd explained his theories to defense counsel. Todd said he had formed his opinion as to the cause of the accident soon after October 1, 2003, and he conveyed that opinion orally to defense counsel. None of this information had been disclosed to the prosecution before trial began in mid-November.

Defense counsel failed to disclose the "statements of experts made in connection with the case" as required by the express language of section 1054.3. (See *Roland v. Superior Court* (2004) 124 Cal.App.4th 154.) The court properly concluded that this type of gamesmanship constitutes a discovery violation.

In a two-sentence aside, defendant asserts that Todd's notes were not discoverable because they fell within the attorney work product doctrine. Defendant did not raise this claim in the trial court, and we therefore do not consider it here.

B. Denial of Right to Surrebuttal

In response to Todd's testimony, the prosecution introduced rebuttal testimony from Robert Snook, who supervised the work of the Multidisciplinary Accident Investigation Team on this accident. Snook was very critical of Todd's analysis and conclusions, and he explained why the accident could not have occurred as Todd had described. He also disagreed with Todd's

testimony that defendant could not have been traveling at the speed witnesses had estimated.

Defendant cross-examined Snook, and then sought to have Todd or Todd's associate defend their work in surrebuttal testimony. The trial court denied defendant that opportunity, stating that if defendant presented such evidence, the prosecution might want "to bring in another witness to say, 'Oh, yes, it is a physical impossibility.' Then maybe you would want to bring in more witnesses to testify, 'oh, it's not a physical impossibility,' and we would go on endlessly on that subject [¶] I am going to remind you that all of this could have been avoided if you had complied with the discovery rules. The purpose of the discovery rules under Proposition Number 115 as specified in Section 1054 is to promote the ascertaining of truth in trial by requiring timely pre-trial discovery and also to save the Court time in trial and avoid the necessity for frequent interruptions and postponements. [¶] For these reasons, your request is denied."

Defendant contends that the court abused its discretion in precluding surrebuttal testimony as a discovery sanction. Defendant fails to recognize that the court's ruling had two different rationales. Surrebuttal was precluded (1) as a sanction for violating discovery rules and, implicitly, (2) as unduly time consuming and potentially prejudicial under Evidence Code section 352. Under either theory, the court's ruling was proper.

"We generally review a trial court's ruling on matters regarding discovery under an abuse of discretion standard. [Citation.] In particular, 'a trial court may, in the exercise of its discretion, "consider a wide range of sanctions" in response to [a] violation of a discovery order.'" (*People v. Ayala* (2000) 23 Cal.4th 225, 299.)

Defendant contends the court erred in precluding surrebuttal testimony because section 1054.5, subdivision (c) cautions that the court "may prohibit the testimony of a witness [as a sanction for violating discovery rules] only if all other sanctions have been exhausted. . . ." Defendant asserts less extreme sanctions were available in the present case.

Here, however, the court did not exclude the testimony of Todd. Todd and his associate testified at great length to explain their investigation and conclusions. The court's sanction was limited in scope, and extended only to refusing to permit additional surrebuttal testimony. The trial court did not abuse its discretion in concluding that defendant had had a more than adequate opportunity to present its case and that counsel's willful discovery violation warranted a limitation on surrebuttal.

But even if we were to conclude that this sanction was inappropriate, the court's decision was nonetheless proper under Evidence Code section 352. Rulings under Evidence Code section 352 are reviewed under an abuse of discretion standard, and a trial court's determination "will not be overturned on appeal in the absence of a clear abuse of that discretion, upon a showing

that the trial court's decision was palpably arbitrary, capricious, or patently absurd, and resulted in injury sufficiently grave as to amount to a miscarriage of justice."

(*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1385.)

A trial judge may limit the scope of surrebuttal evidence to prevent repetition of matter that should have been covered in the original case or to prevent unfairness to the other party.

(See 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000)

Criminal Trial, § 546, pp. 782-783.) Here, defendant presented his expert's testimony at length and cross-examined Snook, the prosecution's rebuttal witness. Any additional testimony explaining why defendant's theories were plausible and more credible than that of the prosecution witnesses would have been repetitive and time consuming in an already lengthy and, at times, tedious trial. The trial court reasonably anticipated an unending parade of witnesses to contradict the testimony offered by the other side. Under these circumstances, the trial court properly exercised its discretion to preclude additional surrebuttal testimony.

C. CALJIC No. 2.28

Defendant contends the court erred in instructing the jury pursuant to CALJIC No. 2.28 ("Failure to Timely Produce Evidence") as a sanction for the discovery violation. Any error was harmless.

The court instructed the jury with the then-operative version of CALJIC No. 2.28, as follows:

"[T]he prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of the truth, save the court time and avoid any surprises that may arise during the course of the trial.

"Concealment of evidence and delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence.

"Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately.

"In this case, the defendant concealed and failed to timely disclose the following evidence: That is, all notes, opinions, and conclusions formulated by expert witness Mr. Todd.

"Although the defendant's concealment and failure to timely disclose evidence was without lawful justification, the court has, under the law, permitted the production of this evidence during the trial.

"The weight and significance of any concealment and delayed disclosure are matters for your consideration. However, you should consider whether these concealed and untimely disclosed evidence pertains to a fact of importance, something trivial or subject matters [that] are already established by other credible evidence."

Several courts have criticized this instruction because it incorrectly imputes an attorney's conduct to the defendant,

fails to provide guidance on how to weigh the effect of the nondisclosure, and encourages speculation. (E.g., *People v. Lawson* (2005) 131 Cal.App.4th 1242, 1247-1249; *People v. Saucedo* (2004) 121 Cal.App.4th 937, 942-943; *People v. Cabral* (2004) 121 Cal.App.4th 748, 751-753; *People v. Bell* (2004) 118 Cal.App.4th 249, 254-257.) Defendant raises the same challenges in this appeal.

The People contend defendant has waived any claim of error by failing to object in the trial court. The People's claim is not entirely accurate. While defendant did not voice these specific objections or otherwise press the point with the trial court, he did in fact object to CALJIC No. 2.28 when the prosecution first proposed it. And, in any event, no objection was required. Courts will review the propriety of any instruction that affects the substantial rights of the accused, even in the absence of an objection, and this is such a case. (*People v. Cabral, supra*, 121 Cal.App.4th at p. 750; § 1259.)

However, even if the court erred in instructing pursuant to CALJIC No. 2.28, the error was harmless. Notwithstanding defendant's characterizations, this was not a close case. Eyewitnesses described defendant's erratic driving and a videotape showed defendant speeding just before the accident occurred. Defendant had a blood alcohol level nearly three times the legal limit, and had taken pain medication as well. Defendant demonstrated consciousness of guilt by intentional thwarting the preliminary alcohol screening testing and in giving inconsistent accounts of his pre-accident conduct. The

prosecution introduced credible evidence relating to the cause of the accident and discredited the testimony of defendant's expert. Under these circumstances, it is not reasonably more probable that defendant would have achieved a more favorable result had the instruction not be given. (See *People v. Cabral*, *supra*, 121 Cal.App.4th at p. 753; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Any error in giving CALJIC No. 2.28 was therefore harmless.

II

Alleged Bias of Trial Court

Defendant contends the trial court was biased against him, thereby violating his constitutional rights to due process and a fair trial. The record indicates otherwise.

Defendant asserts the court's disparaging remarks about defense counsel prejudiced the jury against him. While the court was critical of counsel at times, it also chastised the prosecutor. "A trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution." (*People v. Carpenter* (1997) 15 Cal.4th 312, 353.) The court's comments reflected its irritation with the prolonged and repetitive examination of witnesses, but fell far short of anything that can be characterized as discrediting the defense or favoring the prosecution.

Nor is defendant correct in his assertion that the court demonstrated bias in its dealings with defense witnesses. A trial court has the duty to control trial proceedings (*People v. Carpenter, supra*, 15 Cal.4th at p.353), and its comments to witnesses reflected efforts to avoid repetition and to keep witnesses on track.

Defendant contends the court's bias was evident when it "attempted to preclude" a toxicologist from testifying for the defense. Defendant's claim requires a brief explanation.

As court began on Tuesday, November 25, 2003, the trial judge announced that court would recess as early as possible the following day so that jurors could prepare for Thanksgiving. On Wednesday morning, before testimony began, the court announced that the session would go through the lunch hour until 1:00 or 1:30 p.m., and then recess for the holiday. At some point that day, the defense counsel informed the court that it wanted to call its toxicology expert at 3:30 that afternoon, and anticipated that testimony lasting up to two hours. The court--not surprisingly--reacted, reminding counsel that he had had ample notice of the court schedule and could have arranged to have his expert available on Wednesday morning or the following Monday morning. The court said this witness "must be here Monday or he will not testify in this case." Defense counsel immediately reassured the court that the witness had since been notified of the change in scheduling and would testify on Monday.

While the court's comments reflected an understandable displeasure with counsel's failure to adjust his witness schedule, they do not reflect bias. And given that the toxicologist in fact testified, defendant cannot demonstrate any prejudice whatsoever.

Finally, citing Code of Civil Procedure section 170.1, defendant asserts that the court demonstrated bias in failing to recuse itself from considering the validity of two prior DUI convictions. Defendant had argued that the records from a 1991 proceeding had not been properly authenticated, and that a 1997 plea was constitutionally invalid because defendant had not been properly advised about the charges. The judge in this trial was the same judge that had presided in both earlier cases.

Defendant's argument is framed only in terms of bias; he does not directly challenge the lack of recusal, the authentication of records, or the constitutionality of his earlier plea. Nothing in the court's handling of these matters evidenced any bias, and defense counsel apparently felt the same way since counsel never raised the issue of recusal in the trial court. The failure to object to the judge's presiding over this matter precludes a direct challenge on appeal. (*People v. Scott* (1997) 15 Cal.4th 1188, 1207.) Defendant's attempt to sidestep this problem by framing the matter as one of bias is unavailing. Regardless of whether the trial court should have heard these issues, there is no evidence that the court was biased in its handling of defendant's claims.

III

Cumulative Effect of Alleged Errors

Defendant contends that the cumulative effect of the alleged errors compels reversal. Having concluded that the only possible error was in the giving of CALJIC No. 2.28, there is no cumulative effect to be assessed.

IV

Lesser Included Offenses

Defendant contends that his convictions on counts 3 and 4, the DUI offenses, must be reversed because they are necessarily included offenses of count 2, gross vehicular manslaughter while intoxicated. We do not agree.

Defendant is correct in asserting that multiple convictions cannot be based on necessarily included offenses. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.) When an offense cannot be committed without necessarily committing another offense, the latter is deemed to be necessarily included. (*Ibid.*)

Relying on *People v. Miranda* (1994) 21 Cal.App.4th 1464 (*Miranda*), defendant asserts that only the statutory definitions of crimes, and not the accusatory pleadings, may be considered in determining whether one offense is a necessarily included offense of another. Penal Code section 191.5 defines gross vehicular manslaughter while intoxicated as "the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section . . . 23153 of the Vehicle Code" Counts 3 and 4

charge offenses under Vehicle Code section 23153 and, according to defendant, are therefore necessarily included offenses, requiring reversal. We disagree with this analysis.

Miranda held that "[f]or purposes of determining the propriety of multiple convictions, an offense is necessarily included if the crimes are defined in such a way as to make it impossible to commit the greater offense without also committing the lesser. [Citation.] This test must be distinguished from that which is used in determining whether it is proper to give jury instructions on lesser offenses. In the latter situation an offense is necessarily included if all of its elements are elements of the greater offense (as in the case of multiple convictions) or if the greater offense is described by the accusatory pleading 'in such a way that if committed as specified the lesser offense is necessarily committed. [Citation.]' [Citations.] This broader standard protects the defendant's due process right to adequate notice before being convicted of a lesser offense *instead* of the charged offense; it does not apply to considerations of whether multiple convictions are proper." (*Miranda, supra*, 21 Cal.App.4th at p. 1467.) The *Miranda* court therefore based its analysis "on the statutes defining the crimes defendant committed, not on the language of the information." (*Ibid.*; see *People v. Montoya* (2004) 33 Cal.4th 1031, 1035-1036 [discussing *Miranda* but declining to determine whether its analysis was correct].)

The situation in *Miranda* differs from the present case in one critical respect: the convictions at issue in *Miranda*

involved one victim; the case before us involves two. Count 2 charged defendant with gross vehicular manslaughter while intoxicated in the death of Frank Johnson. Count 3 charged defendant with DUI causing injury to Frank Johnson *and* Mary Abello. Count 4 charged defendant with driving with a blood alcohol level of at least 0.08 percent and causing injury to both Frank Johnson *and* Mary Abello.

If a defendant suffers multiple convictions for offenses committed against one victim, the *Miranda* analysis may be appropriate. But where there is one victim for the greater offense and additional victims for the other offenses, those other offenses cannot be deemed to be necessarily included, even though the statutory language of the charged offenses might otherwise lead to such a conclusion. A person who commits gross vehicular manslaughter against *one* victim does not commit offenses under Vehicle Code section 23153 against *multiple* victims. Put differently, to kill Frank Johnson through gross vehicular manslaughter, defendant did not *necessarily* injure Mary Abello while driving under the influence of alcohol or while driving with a blood alcohol level in excess of 0.08 percent. The two were separate crimes and defendant's reliance on *Miranda* is misplaced.

Defendant was properly convicted on all three counts.

DISPOSITION

The judgment is affirmed.

We concur: HULL, J.

SIMS, Acting P.J.

DAVIS, J.